No. 76-96

In the Supreme Court of the United States

OCTOBER TERM, 1976

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (A. 25-43) is reported at 535 F. 2d 533. The district court's opinion (A. 19-24) is not officially reported but is unofficially reported at 12 FEP Cases 1298.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1976. The petition for a writ of certiorari was filed on July 23, 1976, and was granted on

December 13, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 permits the Equal Employment Opportunity Commission to bring an enforcement action more than 180 days after the filing of the underlying charge of employment discrimination.

2. Whether an enforcement action brought by the Commission is subject to state statutes of limitations.

STATUTORY PROVISION INVOLVED

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V.) 2000e-5(f)(1), provides in pertinent part:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge * * *. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section * * * or

> the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved * * *.

STATEMENT

In February 1974, the United States Equal Employment Opportunity Commission, pursuant to its enforcement powers under Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. V) 2000e-5(f)(1), filed suit against petitioner, charging unlawful sex discrimination in various employment practices (A. 9-12). The Commission sought both an injunction against sexually discriminatory employment practices and back pay for persons who had been adversely affected by such practices (A. 12).

The Commission's suit was based on a charge Tamar Edelson had filed with its San Francisco, California, District Office on March 9, 1971 (A. 5-6).[1] At the time the charge was filed, the San Francisco Office had eight investigators on its staff and approximately 1000 charges pending before it (A.

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[1] The charge was first lodged with the Commission in December 1970 (A. 3). It was then referred to the appropriate state agency for consideration. It was subsequently referred back to the Commission and formally filed at that time. See *Love* v. *Pullman Co.*, 404 U.S. 522.

6).[2] Investigation of the charge was commenced by service of the charge on petitioner on August 16, 1971 (*ibid.*). The Commission served proposed findings of fact on petitioner on February 25, 1972, and petitioner filed exceptions to them on March 23, 1972 (*ibid.*).

On July 13, 1972, the Commission invited petitioner to participate in conciliation discussions; petitioner entered into such discussions, and the Commission stayed its ruling pending their outcome (*ibid.*). On October 20, 1972, these initial conciliation efforts were deemed unsuccessful, and on February 2, 1973, the Commission determined that there was reasonable cause to believe complainant Edelson's charge (*ibid.*).

On February 26, 1973, and March 20, 1973, petitioner requested further conciliation discussions (A. 7). Such discussions continued until July 9, 1973 (*ibid.*). On September 13, 1973, the Commission determined that the further conciliation efforts had failed, and it so notified petitioner (*ibid.*). At this time, complainant Edelson requested that the case be referred to the Commission's General Counsel to bring an enforcement action (*ibid.*).[3]

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[2] The facts recited are taken from an affidavit by the Commission submitted in the district court, which the court necessarily accepted in ruling on petitioner's motion for summary judgment (see A. 19).

[3] It appears that complainant Edelson was never formally notified of her right to bring suit herself (A. 7).

On February 22, 1974, the Commission filed an enforcement action in the United States District Court for the Central District of California (A. 9). The district court dismissed the complaint on the ground that Section 706(f)(1) requires that any enforcement action be brought within 180 days of the filing of the charge with the Commission (A. 21). Alternatively, the court held that the Commission's enforcement action was subject to state statutes of limitations and consequently was barred by the one-year limitation period of the California Code of Civil Procedure § 340(3) (West 1954) (A. 21-22).

The court of appeals reversed, holding both that the Commission's power to bring suit does not lapse upon the expiration of 180 days from the filing of a charge (A. 27-28) and that the Commission's enforcement actions are not subject to state statutes of limitations (A. 29-38).

SUMMARY OF ARGUMENT

I

In 1972, Congress amended Section 706(f) of the Civil Rights Act of 1964 to grant the Equal Employment Opportunity Commission statutory authority to bring civil actions to enforce private rights against unlawful employment discrimination. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44. In amending the Act, Congress preserved the existing private right of action by providing that "if within one hundred and eighty days from the filing

of [the] charge of [employment discrimination] * * * the Commission has not filed a civil action under this section * * *, a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *." Section 706(f)(1) of the Act. Petitioner's principal argument is that this provision imposes a limitation on the Commission's right to bring an enforcement action.

A. By its terms, the statute imposes no period of limitation on the Commission's right to sue. The only conditions placed upon the Commission's enforcement actions are preconditions: more than 30 days must have passed after the charge was filed, and the Commission must have been unable to obtain an acceptable conciliation agreement. "The statute contains no other restrictions, either express or implied." *Equal Employment Opportunity Commission* v. *Duval Corp.*, 528 F. 2d 945, 947 (C.A. 10).

The 180-day provision upon which petitioner relies is merely a temporary bar to institution of a private action; it places no limitation or prohibition on the later institution of enforcement actions by the Commission. Indeed, Congress rejected a proposal that would have terminated the Commission's authority to act with respect to a charge after the expiration of the 180-day period. S. 2515, 92d Cong., 1st Sess. (1971). When Congress has established time constraints in Title VII, it has done so in clear, precise, and unambiguous language. "The very absence of an explicit Commission limitation, in the face of an express private limitation, strongly suggests that Congress did not intend that EEOC actions be governed by the limitation period." *Equal Employment Opportunity Commission* v. *E.I. duPont de Nemours and Co.*, 516 F. 2d 1297, 1300 (C.A. 3).

B. A period of limitation should not be inferred if it is not explicit, for such a limitation would be in conflict with the overriding legislative concern for vindication of private rights against employment discrimination. Congress intended aggrieved individuals to be able to elect between private litigation and Commission enforcement actions. A 180-day limitation on actions brought by the Commission would deprive such individuals of that choice and would terminate the Commission's enforcement authority for failure to meet a timetable that Congress knew to be incompatible with the Commission's workload and limited resources. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 12 (1971).

Because of the heavy volume of charges and the time required for conciliation, the Commission often is unable to complete conciliation within 180 days. If the sanction of litigation is terminated after 180 days, the Commission's ability to conduct effective conciliation would be largely nullified.

Moreover, if the Commission is barred from bringing suit after 180 days, thousands of complainants would be forced to bring suit themselves in order to vindicate their rights under the Act. It was to avoid this result that Congress granted the Commission litigation enforcement powers in the first place, for

many complainants are poor and unable to afford legal representation.

II

Enforcement actions brought by the Commission are not subject to state statutes of limitations. Where the federal government exercises the right to sue under a federal statute, such suits are subject to state statutes of limitations only where the clear congressional intent requires that result. *United States* v. *Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 125. Since neither the terms of Title VII nor its legislative history indicate an intent that state statutes of limitations govern Commission enforcement efforts, this action is not subject to state-imposed time limitations.

The application of state statutes of limitations would jeopardize efforts at conciliation, encourage premature litigation, and thwart the underlying statutory purpose of eradicating discrimination in employment. Applicability of a statue of limitation could lead recalcitrant employers to prolong conciliation past the point at which either the Commission or complainants could bring suit. To protect themselves, complainants would be forced to bring suits prematurely, while potentially fruitful conciliation efforts continued. In many cases, their inability to maintain a lawsuit would frustrate vindication of their statutory rights.

The public interest character of the Commission's enforcement actions precludes application of state statutes of limitations. Cf. *United States* v. *Summerlin*, 310 U.S. 414; *Trbovich* v. *United Mine Workers*, 404 U.S. 528. A suit to enforce Title VII rights involves " 'the vindication of a major public interest.' " *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 n. 40. Title VII back pay awards are an integral part of the statutory relief scheme and also partake of this public character. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-419. Therefore, whether the relief sought is back pay or an injunction, when the Commission sues to enforce Title VII it is acting as the sovereign in attempting to promote the public interest and is immune from state limitations periods.

ARGUMENT

I

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PERMITS THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO BRING AN ENFORCEMENT ACTION MORE THAN 180 DAYS AFTER THE FILING OF THE UNDERLYING CHARGE OF EMPLOYMENT DISCRIMINATION

The purpose and history of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, were concisely summarized by this Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or

national origin. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971). Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

The 1972 amendment to which the Court referred, granting the Commission statutory authority to bring enforcement actions in federal district courts, is now incorporated in Section 706(f)(1) of the Act, 42 U.S.C. (Supp. V) 2000e-5(f)(1). Prior to the amendment, the role of the Commission in eliminating employment discrimination had been limited, as this Court noted, to that of conferee, conciliator, and persuader. If conciliation failed, the party alleging discrimination, but not the Commission, was empowered to bring a civil action to enforce the statutory right against discrimination. See Section 706(e) of

the Act, 42 U.S.C. (1970 ed.) 2000e-5(e). The Commission had no right even to intervene in such actions. *Braddy* v. *Southern Bell Telephone & Telegraph Co.*, 458 F.2d 666 (C.A. 5); *Air Lines Stewards and Stewardesses Assn, Local 550* v. *American Airlines, Inc.*, 455 F. 2d 101 (C.A. 7), certiorari denied, 416 U.S. 993.

In 1972 Congress determined that this exclusive reliance upon conciliation and private litigation had proven unsatisfactory, and it concluded that the Commission had been "ineffective due directly to its inability to enforce its findings." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 5 (1971) (Legislative History at 65).[4] Accordingly, Section 706 was amended to authorize the Commission to institute civil litigation on behalf of individuals charging unlawful employment discrimination. But Congress intended that this power would be exercised only as a last resort: "[o]nly if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement." 118 Cong. Rec. 7563 (1972) (Legislative History at 1856). Thus the 1972 amendment enlarged the Commission's powers without lessening its responsibility to investigate individual complaints and to attempt to resolve such complaints through conciliation.

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[4] "Legislative History" refers to the Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (Committee Print, 1972).

The various responsibilities of the Commission are made explicit in Section 706. The Commission is required to investigate all charges of employment discrimination, and "if the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation and persuasion." Section 706(b). "If * * * the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action * * *." Section 706(f)(1).

Having armed the Commission with this twin mandate to conciliate where possible and litigate where necessary, Congress "hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General as appropriate." 118 Cong. Rec. 7168 (1972) (Legislative History at 1847). Congress preserved the private right of action, however, by providing that "if within one hundred and eighty days from the filing of [the] charge [of employment discrimination] * * * the Commission has not filed a civil action under this section * * *, a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *." Section 706(f)(1).

Petitioner's principal argument (Br. 18-34) is that this statutory language imposes a limitation on the Commission's right to bring its own enforcement action: petitioner asserts that the Commission must bring its action within 180 days or not at all. Every court of appeals that has addressed this issue has held to the contrary.[8] As we now show, neither the language of the statute nor its evident purposes are consistent with so stringent a limitation as petitioner would have this Court impose on the Commission's ability to provide effective enforcement of Title VII.

A. By Its Terms, The Statute Imposes No Period Of Limitation On The Commission's Enforcement Actions

Section 706(f)(1) of the Act contains two directives, one addressed to civil actions brought by the aggrieved party and the other to actions brought by the Commission. The statute first addresses the power of the Commission to sue:

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[8] *Equal Employment Opportunity Commission* v. *E. I. du-Pont de Nemours and Co.*, 516 F.2d 1297 (C.A. 3); *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F.2d 153 (C.A. 4), certiorari denied, 420 U.S. 946; *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co.*, 505 F.2d 610 (C.A. 5), certiorari denied, 423 U.S. 824; *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F.2d 1352 (C.A. 6), certiorari denied, 423 U.S. 994; *Equal Employment Opportunity Commission* v. *Meyer Brothers Drug Co.*, 521 F.2d 1364 (C.A. 8); *Equal Employment Opportunity Commission* v. *Duval Corp.*, 528 F.2d 945 (C.A. 10).

> "If within thirty days after a charge is filed with the Commission * * * the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency or political subdivision named in the charge."

This language, read in isolation, might suggest that the Commission may bring suit at any time after the expiration of 30 days after the filing of the charge, *i.e.*, that the only statutory condition placed upon the Commission's right to sue is that 30 days pass without a conciliation agreement being entered into. But the lower federal courts uniformly have concluded that the Commission's right to sue under Section 706(f)(1) must be considered in light of the Commission's affirmative obligation, under Section 706(b), to serve notice of the charge, to investigate to determine whether there is reasonable cause to believe the charge is true, and to attempt to eliminate alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. " 'The Commission's power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a unified scheme for securing compliance with Title VII.' " *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F. 2d 944, 948 (C.A. 8). These courts therefore have held that a suit brought by the Commission before discharging its responsibility to investigate and attempt conciliation is premature. See, *e.g.*, *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 272 (C.A. 4); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 869 (C.A. 5); *Equal Employment Opportunity Commission* v. *Container Corp. of America*, 352 F. Supp 262, 265 (M.D. Fla.).

Thus Section 706(f)(1) has been read as imposing two independent conditions on the Commission's authority to initiate litigation: (1) that more than 30 days must have elapsed from the filing of the charge underlying the suit[6] and (2) that the Commission has been unable to obtain an acceptable conciliation agreement from the respondent. No other conditions or limitations are placed on the Commission's power to sue. "The statute contains no other restrictions, either express or implied." *Equal Employment Opportunity Commission* v. *Duval Corp.*, 528 F. 2d 945, 947 (C.A. 10).

Section 706(f)(1) further establishes a qualified private right of action:

> If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), which ever is later, the Commission has not filed a civil action under this section * * * or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify

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[6] Even during that initial period the Commission may seek temporary relief. See Section 706(f)(2) of the Act.

> the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *.

Private actions thus can be brought either when the Commission has dismissed the charge or when the Commission has failed to act within 180 days after the filing of the charge. The statute "serves its apparent purpose when it limits the time before which a private action may not be filed and thus avoids potential interference with the Commission in the performance of its primary duties of conciliation and enforcement." *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F. 2d 153, 156 (C.A. 4), certiorari denied, 400 U.S. 946. Thus the 180-day provision is merely a temporary bar to institution of a private action, imposed for the purpose of affording a period of time within which investigation and conciliation may take place in a relatively nonadversarial setting. By its terms, that provision does not place any limitation or prohibition on the institution of an enforcement action by the Commission at some later date.

The predecessor of Section 706(f), Section 706(e) of the 1964 Act, also postponed the complainant's right to bring suit so that the Commission would have some time to attempt to obtain voluntary compliance before the matter was laid before a court. Under former Section 706(e), the complainant was required to wait only 30 days after filing charges before bringing suit. That 30-day period was never

viewed as the full measure of the Commission's authority to attempt conciliation. To the contrary, it was recognized that the statute anticipated continuing conciliation efforts by the Commission beyond the 30-day period. See 29 C.F.R. 1601.25a (1968), 31 Fed. Reg. 14255. See also *Cunningham* v. *Litton Industries*, 413 F. 2d 887 (C.A. 9); *Bayport Fabricating, Inc.* v. *Equal Employment Opportunity Commission*, 3 FEP Cases 520, 521 (S.D. Tex.). By the same token, the extension of that period to 180 days cannot be read as placing a limitation on the Commission's ability to exercise its statutory powers, which now include the authority to bring civil enforcement actions.

Indeed, Congress explicitly rejected a proposal that would have imposed such a limitation. While Congress was considering amendments to the Act in 1972, it had before it a proposal to give the Commission power to issue cease-and-desist orders. Part of the proposal would have terminated the Commission's authority to act with respect to a charge upon the filing of a private action after expiration of the 180-day period. S. 2515, 92d Cong., 1st Sess. (1971). Thus Congress was aware that, in the absence of a specific prohibition, the Commission's power to act continued beyond the 180-day period, and even beyond the initiation of private litigation.

Congress had before it language that would have changed that result, and it declined to adopt that language. Nor did it adopt any equivalent expression of a limitation on the power of the Commission. See

Equal Employment Opportunity Commission v. *E. I. duPont de Nemours and Co., supra,* 516 F. 2d at 1300, n. 13; *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co.,* 505 F. 2d 610, 615 (C.A. 5), certiorari denied, 423 U.S. 824.

On those occasions when Congress decided to establish time constraints, it did so in clear, precise, and unambiguous language.[7] As the Court of Appeals for the Third Circuit pointed out in *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra,* 516 F. 2d at 1300 (footnotes omitted):

> [W]hen Congress sought to impose specific time limitations in other portions of Section 706 it did so clearly: Charges are to be filed within 180 days of the alleged discriminatory occurrence; an employer is to be notified of the charge within 10 days; an investigation is to be completed within 120 days "so far as practicable"; civil actions are to be expedited; a master can be appointed if the case has not been scheduled for trial within 120 days after issue has been joined; and back pay liability is limited to two years prior to the filing of the charge.

[7] Section 706(e) states unequivocally that "[a] charge under this section shall be filed within one hundred and eighty days * * *." Section 706(b) requires that "the Commission shall serve a notice of the charge * * * on such employer * * * within ten days * * *." Equally definite as to the time and against whom it runs is a later part of the same statute providing that "[t]he Commission shall make its determination on reasonable cause as promptly as possible and so far as is practicable, not later than one hundred and twenty days from the filing of the charge * * *." Section 706(f)(2) states that "[i]t shall be the duty of the court * * * to assign cases for hearing at the earliest practicable date * * *." Section 706(f)(5) requires that "[i]f such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master * * *."

Section 706(f)(1) also provides only 90 days after the Commission notifies the complainant of his right to bring suit within which that right may be exercised. No similar limitation is placed upon the Commission's authority to sue. "The very absence of an explicit Commission limitation, in the face of an express private limitation, strongly suggests that Congress did not intend that EEOC actions be governed by the limitation period." *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra,* 516 F. 2d at 1300. See also *Equal Employment Opportunity Commission* v. *Cleveland Mills Co., supra,* 502 F. 2d at 156; *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co., supra,* 505 F. 2d at 613.

Full investigation and efforts at conciliation often may extend beyond 180 days. See S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5-6, 87 (1971) (Legislative History at 414-415, 495). The Commission may not bring suit unless it has been unable to secure an acceptable conciliation agreement. Section 706(f)(1); *Patterson* v. *American Tobacco Co., supra.* Thus a 180-day period of limitation would bar

many Commission actions altogether. Moreover, Congress cannot be assumed to have forced the Commission to choose between litigation and conciliation by requiring the Commission to cease conciliation and bring suit within 180 days or forego suit altogether. See *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra*, 516 F. 2d at 1300. Cf. *E. I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456.

B. The Statutory Purpose Confirms That No Limitation On The Commission's Right To Sue Was Intended

The overriding congressional concern in enacting the 1972 amendments to the Act was "[w]hat procedures will ensure the most effective enforcement of the substantive provisions of Title VII * * *." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 98 (1971) (Legislative History at 118). Petitioner argues (Br. 12-15) that because Congress was concerned with the delays attendant upon the administrative process, it must have intended to bar further enforcement by the government after 180 days. Such an intention would have been at odds with Congress' principal concern in adopting the 1972 amendments.

There is no doubt that Congress was unhappy about administrative delays and hoped that granting the Commission authority to litigate would result in more expeditious action. Petitioner catalogues the remarks of individual congressmen expressing that concern. However, those parts of the floor debate that petitioner cites as suggesting a limitation period

"are highly ambiguous at best." *Equal Employment Opportunity Commission v. Louisville & Nashville R. Co., supra*, 505 F. 2d at 616. The expressions of individual views upon which petitioner relies do not establish that Congress intended that the litigation authority granted to the Commission would terminate 180 days after the filing of the charge.[8] Those statements cannot be substituted for Congress' failure to write a time limitation into the Act.

Nor do such statements constitute the most relevant or authoritative legislative history. "Of more utility, * * * is the studied Section-by-Section Analysis" prepared by Senators Williams and Javits explaining the Act as agreed to by the Joint Conference Committee. *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra,*

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[8] While Senator Dominick at one point noted that an amendment to reduce the 180-day period to 150 days "reduces the time period within which the Commission may file" (118 Cong. Rec. 2862 (1972) (Legislative History at 1347)), he also referred to the 180-day provision as a "private filing restriction" (118 Cong. Rec. 1069 (1972) (Legislative History at 893)). In a slightly different context, Senator Dominick also observed that "I do not think the Commission should be mandated on what date [it] should bring suit when [it is] trying to work out matters the best [it] can by conciliation." 118 Cong. Rec. 1069 (1972) (Legislative History at 894). Similarly, while Senator Javits termed the 180-day provision as "the allowable time for the Commission to move into a given situation" (118 Cong. Rec. 1800 (1972) (Legislative History of 1578)), at another point he expressed the view that "the Commission should not, in view of its purpose, be under * * * [a] strict timetable * * *." 118 Cong. Rec. 1069 (1972) (Legislative History at 894).

516 F. 2d at 1300. That analysis confirms that the 180-day provision was not intended to cut off the Commission's right to bring a civil action but merely (118 Cong. Rec. 7168 (1972) (Legislative History at 1847)):

> to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, the provisions described above allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.

Congress contemplated that a private party was to have the option either to sue in his own name or to rely upon the Commission's enforcement efforts. See *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352, 1358-1359 (C.A. 6), certiorari denied, 423 U.S. 994; *Tuft* v. *McDonnell Douglas Corp.*, 517 F. 2d 1301, 1305-1306 (C.A. 8); *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co.*, *supra*, 516 F. 2d at 1300.[9] But the complainant's right to elect between

[9] Petitioner argues (Br. 29) that the provision of Section 706(f)(1) that permits the Commission to intervene only in those private suits of public importance implies that the Commission cannot itself sue after 180 days. But it implies only that Congress wished to bar duplicative actions involving identical claims and that the Commission lacks power to bring its own enforcement actions only if the complainant chooses "to elect to pursue his or her own remedy."

remedies would be illusory if the Commission's right of action already had been extinguished. If, as the section-by-section analysis indicates, the complainant could "elect to pursue his or her own remedy," the inference is necessary "that the Commission's right to sue continues after the individual's right has matured." *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, *supra*, 502 F. 2d at 157.

In placing the conference report before the House, Congressman Perkins emphasized that conciliation was to be the primary method of Title VII enforcement and that recourse to the remedy of litigation would be appropriate only where "conciliation proves to be impossible." 118 Cong. Rec. 7563 (1972) (Legislative History at 1856). Careful consideration and patient study of employment practices and exploration of avenues of agreement take time. *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, *supra*, 502 F. 2d at 157. The Sixth Circuit observed in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, 511 F. 2d at 1357:

> It is precisely in the type of case where the EEOC might ultimately decide to sue—where widespread discrimination of a systematic or subtle nature is involved—that effective conciliation attempts may well require more than six months. In such cases, discussion will be necessary with labor unions and company personnel, expert consultants may be involved, and the charging parties must be kept fully informed of the progress of negotiations.

Congress was well aware that, because of the large number of charges received [10] and the time required for conciliation, the Commission could not process charges within 180 days.[11] See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., pp. 3-5, 12 (1971) (Legislative History at 63-65, 72); S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5-6, 87 (1971) (Legislative History at 414-415, 495). In the absence of compelling evidence, Congress cannot be presumed to have enacted a statute of limitation that would terminate the Commission's litigation authority for failure to meet a timetable totally incompatible with the Commission's workload and limited resources.

Congress would not have imposed a limitation period that could have no other result than to nullify the Commission's power to conduct effective conciliation.

[10] At the end of fiscal year 1976, there were nearly 128,000 charges pending with the Commission. BNA Daily Labor Report No. 14 (January 20, 1977).

[11] Petitioner assumes (Br. 30) that delays are the result of failures on the part of the Commission to act expeditiously rather than the volume of claims and the limited Commission resources. The Fifth Circuit reviewed the legislative history and concluded that "we find no significant indication that Congress attributed the backlog to inefficiency." *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co., supra*, 505 F.2d at 617. Indeed, in many cases delay is occasioned by employers who, like petitioner (A. 7), request prolongation of conciliation efforts beyond the point at which the Commission has determined initial efforts to have been unsuccessful.

tion.[12] A respondent who prolongs conciliation efforts by pretending to bargain in good faith could easily extend the administrative process beyond 180 days. See *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra*, 516 F. 2d at 1300. Under petitioner's argument here, the Commission would thereupon be deprived of the principal sanction with which to back up its further efforts to achieve conciliation.

The Commission could avoid this dilemma only by prematurely laying the matter before a court, thereby terminating potentially fruitful conciliation efforts.[13] But such premature actions cannot be brought under the statutory language permitting suit only "if * * * the Commission has been unable to secure * * * [an acceptable] conciliation agreement." Section 706 (f) (1) of the Act. See *Patterson* v. *American Tobacco*

[12] As the court noted in *Equal Employment Opportunity Commission* v. *Bartenders Int'l Union, Local 41*, 369 F. Supp. 827, 831 (N.D. Cal.):

> Mindful of two and three year delays, this court cannot accept defendant's contention that when Congress gave the Commission the right to sue with one hand, it took it away with the other by requiring that the suit be commenced within a time constraint which it knew the Commission could not meet.

[13] Section 706(f) (1) provides that "[u]pon request, the court may, in its discretion stay further proceedings for not more than sixty days pending * * * further efforts of the Commission to obtain voluntary compliance." Although that provision may make it possible for efforts to continue in some cases, the filing of suit itself may affect the conduct of compliance efforts.

Co., supra; Equal Employment Opportunity Commission v. *Hickey-Mitchell Co., supra.* Congress did not intend to require premature actions, a requirement that would weaken the conciliation process, or add unnecessarily to the caseloads of the district courts, or both.

Moreover, if the Commission is barred from bringing suit after 180 days and does not do so before, thousands of complainants would be forced to bring suit themselves in order to vindicate their rights under the Act. Since many complainants are poor and unable to afford legal representation, their inability to bring suit would effectively deprive them of the protection against employment discrimination that Congress meant to confer. It was to avoid precisely this result that Congress granted the Commission litigation enforcement powers in the first place (S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 17 (1971) (Legislative History at 426)):

> Since most title VII complainants are by the very nature of their complaint disadvantaged, the burden of going to court, initiating legal proceedings by retention of private counsel, and the attendant time delays and legal costs involved, have effectively precluded a very large percentage of valid Title VII claims from ever being decided. * * * [T]he public has an overriding interest in protecting the individual from the denial of those rights which Congress has specifically provided.

In short, the 180-day limitation period petitioner would read into the statute would significantly interfere with judicial as well as administrative vindication of Title VII rights. This Court "will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799.

There is no evidence that Congress considered the public interest in Title VII enforcement by the Commission secondary to the goal of quick administrative action. Instead, the legislative record points to a congressional recognition that while delays in the system were unfortunate and administrative action should be expedited, fulfillment of Title VII goals was the first priority. For example, in emphasizing the promptness with which it hoped the Commission would make its reasonable cause determinations, Congress was careful to avoid placing an absolute time limitation upon the deliberative functions of the Commission with respect to discrimination claims. Section 706(b) provides only that "so far as practicable," the Commission is to "make its determination on reasonable cause * * * not later than one hundred and twenty days from the filing of the charge."

Since Congress carefully avoided placing an absolute time limitation on the first step in the prelitigation process, and imposed no explicit limitation on when further steps were to be taken, there is no reason to infer that Congress intended that the Commission would forfeit its litigation powers altogether if the final steps were not taken within 180 days.

Congress' decision to permit the Commission to bring suit with respect to the thousands of charges pending with the Commission on the effective date of the 1972 amendments (Pub. L. 92-261, Section 14, 86 Stat. 113) also indicates that Congress' principal concern was with the widest possible Commission enforcement rather than with the imposition of a limitation period. See *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra; Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp., supra.* Congress was well aware of the limited extent of the Commission's resources but acted to permit Commission suits on pending claims, even though most of those cases could not have been brought within 180 days of the original filings of the charges. *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co., supra,* 505 F. 2d at 613.[14] Interpreting the 180-day provision as a statute of limitation is "flatly in conflict with [that section]" and would bar the Commis-

[14] The reason for making the 1972 amendments applicable to cases pending before the Commission was explained by the Attorney General in a letter quoted in *Equal Employment Opportunity Commission* v. *Christiansburg Garment Co., Inc.,* 376 F.Supp. 1067, 1074 (W.D. Va.):

> [T]he present provisions of S. 2515 (Se. 13) contemplate that the new enforcement provisions would only apply to charges filed after its effective date. We see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority.

sion from bringing enforcement actions on those charges "despite explicit congressional intent that two-year-old charges 'have the benefit of the new enforcement authority.'" *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp., supra,* 511 F. 2d at 1357-1358.

The claim that the 180-day period constitutes a statute of limitations for Commission enforcement actions therefore has no more support in the underlying congressional purpose and legislative history than it does in the statutory language. A 180-day limitation period would be contrary to the intent expressed throughout the Act and its history to extend rather than limit effective Title VII protections. Nor would such a limitation square with the Commission's two responsibilities of conciliation and litigation. "The congressional purpose that the possibilities of voluntary compliance by agreement be first thoroughly explored and the congressional purpose that judicial enforcement proceedings be primarily the province and responsibility of the Commission may be harmonized but not if a 180-day period from the filing of the charge is imposed for the filing of judicial proceedings." *Equal Employment Opportunity Commission* v. *Cleveland Mills Co., supra,* 502 F. 2d at 157.[15]

[15] Petitioner argues that if an employer is engaged in a continuing violation, a new charge could be filed that would restart the running of the limitation period (Br. 33). Such an approach "would serve no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman Co.,* 404 U.S. 522, 526. As the court said in *Equal*

II

COMMISSION ENFORCEMENT ACTIONS ARE NOT SUBJECT TO STATE STATUTES OF LIMITATION

Petitioner states broadly that "this Court has repeatedly held that suits filed under [federal] statutes [that contain no limitation period] are governed by the most analogous state limitation period" (Br. 34). But the cases upon which petitioner relies for that proposition involved only private actions brought under such statutes. See, *e.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454. Cf. *Runyan* v. *McCrary*, 427 U.S. 160, 180. The rule is otherwise when the federal government itself exercises a right to sue under a federal statute.[16]

Employment Opportunity Commission v. *Cleveland Mills Co.*, *supra*, 502 F. 2d at 157:

> [Limiting the Commission's right to sue to a period of 180 days following the filing of the charge] would necessitate the filing of multiple charges and would further complicate the Commission's work with technicalities serving no useful purpose. If the processes of investigation and conciliation are proceeding actively 180 days after the filing of the charge, the Act's purposes are served by permitting the administrative processes to proceed to completion as rapidly as possible. Discontinuance and disruption in commencing new proceedings would serve no such purpose.

[16] Indeed, private suits to enforce rights created by Congress have been held not to be subject to state statutes of limitations when the sole remedy is in equity. *Holmberg* v. *Armbrecht*, 327 U.S. 392.

Such suits are subject to state statutes of limitations only where the congressional intent clearly requires that result. *United States* v. *Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 125. "It has always been the rule that statutes of limitation do not apply to the United States in the absence of a clear and manifest congressional intent that they shall apply." *United States* v. *De Queen and Eastern Railroad Co.*, 271 F. 2d 597, 600 (C.A. 8). This rule is grounded in considerations of federalism and reflects the constitutional judgment that within its area of competence the federal government must be free to act without state interference.

The Act by its terms does not subject the Commission's enforcement litigation to state statutes of limitations.[17] Nor is there any indication in the legislative history of a congressional intent that state statutes would govern the Commission's enforcement efforts. Accordingly, under the settled rule pertaining to government litigation, this action is not subject to the state limitations upon which petitioner relies.

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[17] Petitioner mistakenly relies (Br. 41 n. 60) on 42 U.S.C. 1988. That statute provides for the application of state law only where federal law is "deficient in the provisions necessary to furnish suitable remedies and punish offenses." In other words, state law applies only to the extent necessary to further the purpose of the Act to vindicate civil rights. In contrast, a statute of limitations would frustrate that purpose. Accordingly, such statutes do not "furnish suitable remedies and punish offenses" within the meaning of 42 U.S.C. 1988.

Application of state statutes of limitations, moreover, would be inconsistent with the Title VII enforcement scheme. Many of the considerations discussed above with respect to the 180-day provision also refute the suggestion that Congress intended the Commission's enforcement actions to be subject to state statutes of limitations. Especially in those jurisdictions with short limitation periods, application of state limitation statutes would jeopardize efforts at conciliation, encourage premature litigation, and thwart the underlying statutory purposes of eradicating discrimination in employment.

Although petitioner is not explicit on this point, presumably it would argue that a state statute of limitation would run from the time the discriminatory act was committed. That was the understanding of the district court (A. 22). But such a rule would be unworkable. The Commission has no jurisdiction to act until a charge is filed, which, as has been demonstrated above, may occur as much as 300 days after the discriminatory act. The Commission is barred by Section 706(f) from bringing an enforcement action within 30 days of the filing of the charge, and it may not thereafter institute litigation until after it has investigated, found reasonable cause, and attempted conciliation. *Patterson* v. *American Tobacco Co., supra; Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co., supra.* In view of the enormous backlog of charges and the time-consuming nature of the required investigatory and conciliatory procedures, the Commission often would

be unable to complete those procedures within the abbreviated limitation period petitioner would have this Court impose.

The legal and practical obstacles to the bringing of timely actions by the Commission under state statutes of limitations would be largely removed by suspending the running of such statutes until the federal right of action fully ripens. *Cf. McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. Indeed, it would appear that the cause of action does not "accrue," and therefore that any applicable statute of limitations by its own terms would not even begin to run, until the federal right of action ripens and the potential plaintiffs are first entitled to bring suit.

The Commission's right to sue does not ripen until it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" (Section 706(f)(1)) or, in other words, until the Commission finally determines that its conciliation efforts have failed. See, *e.g.*, *Patterson* v. *American Tobacco Co., supra.* That did not occur here until September 13, 1973 (A. 7), and this action was instituted within six months thereafter (A. 9). Thus even if petitioner is correct in its contention that state statutes of limitation apply to enforcement actions brought by the Commission, this action was brought within the pertinent limitation period and so was not barred.

Even so, it is unlikely that Congress intended to subject the Commission to the vagaries of state statutes of limitations. Nothing in the legislative history suggests that Congress believed that the employment

practices of corporations operating multistate businesses would or should be varyingly susceptible to correction depending on the state in which suit is brought challenging those practices. Moreover, in many jurisdictions there may be substantial uncertainty about which of several statutes of limitations should apply. As one commentator has noted, if Congress has not decided what the appropriate limitation period should be, "the pretense that state legislatures had decided it leads only to confusion." Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 Colum. L. Rev. 763, 771 (1968). This Court recognized this problem a century ago in *United States* v. *Thompson*, 98 U.S. 486, 491:

> The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the States. How that mercy would in many cases be exercised it is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The public interest character of the Commission's enforcement actions precludes application of state statutes of limitation. Cf. *United States* v. *Summerlin*, 310 U.S. 414; *Trbovich* v. *United Mine Workers*, 404 U.S. 528. See also *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362; *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 688-689 (C.A. 5). The enforcement of a national policy against employment discrimination, like enforcement of federal statutes governing health, labor relations, and business, is a matter of vital government concern. Congress created the Commission to eliminate unlawful employment discrimination, a mission this Court has characterized as being of the highest priority. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47.

Congress stated that "the Commission has the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, *supra*, at 14 (Legislative History at 74). Thus a suit to enforce Title VII rights "involve[s] the vindication of a major public interest." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 n. 40. The interest of private parties in the outcome of such litigation does not deprive it of its public character. *Ibid.* See also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418.

These considerations have led the courts of appeals to hold, without exception, that when the Commission sues to enjoin unlawful employment practices, it is acting as the sovereign in furthering the public interest and therefore is not subject to state limitations periods. See *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, 511 F. 2d 456 (C.A. 5), affirmed on rehearing, 521 F. 2d 223; *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*. The Sixth Circuit correctly observed in the latter case (511 F. 2d at 1359):

> [T]he eradication of discrimination by race and sex promotes public interests and transcends private interests. * * * "[T]he Commission may, in the public interest, provide relief which goes beyond the limited interests of the charging parties." Thus, the EEOC represents the public interest when it sues to enforce Title VII, not solely the interests of the private charging parties.

Petitioner nevertheless argues, relying on *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, *supra*, that at least that portion of the Commission's suit that seeks back pay for individual victims of discrimination implicates only private rights and therefore should be subject to the state statute of limitation. But subsequent to the Fifth Circuit's decision in *Griffin Wheel*, this Court has had occasion to emphasize the public character of back pay awards. *Franks* v. *Bowman Transportation Co.*, *supra*; *Albemarle Paper Co.* v. *Moody*, *supra*. In *Albemarle Paper*, the Court referred to the similarity in this respect of Title VII and the National Labor Relations Act, in both of which "making the workers whole for losses suffered" plays an important role in the "vindication of the public policy" (422 U.S. at 419).[18] Cf. *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27.

Because back pay is such a fundamental element in the statutory scheme for protection against em-

[18] The Court noted that the back pay provision of Title VII was modeled after the National Labor Relations Act (422 U.S. at 419).

ployment discrimination, any distinction between injunctive and back pay claims for statute of limitations purposes would be artificial and inappropriate. This Court has previously held the United States immune from a state limitation period where its suit to collect money on behalf of private individuals was also a vehicle for achievement of public policy objectives.[19] See, *e.g.*, *United States* v. *Minnesota*, 270 U.S. 181, 196. As the Court has noted, "[u]nless expressly waived, [immunity from state limitations periods] is

[19] The role of the Commission in Title VII enforcement contrasts sharply with the situation presented by *United States* v. *Beebe*, 127 U.S. 338, where the United States was merely a formal plaintiff. In *Beebe* the United States brought suit against the heirs of an individual who had fraudulently obtained patents for land. Despite the absence of any statute authorizing suit, the Court allowed the government to file the action but held that it was subject to the applicable state limitation period since the private parties rather than the United States were the real parties in interest. The Court reasoned (127 U.S. at 347; emphasis added):

> We are of the opinion that when the government is a mere formal complainant in a suit, *not for the purpose of asserting any public right or protecting any public interest* * * *, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone.

By contrast, when the Commission files suit to eliminate unlawful employment practices and seeks back pay, it is discharging its responsibility to achieve the objectives of Title VII and is not in reality suing on behalf of private parties alone.

implied in all federal enactments." *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343, 351. The same reasoning is applicable here, and the same result is appropriate.

Petitioner argues that application here of the long-standing doctrine precluding application of state limitations to federal actions would allow the Commission to sue at any time without limitation, that respondents will be prejudiced by the litigation of stale claims, and that Congress could not have intended that result. But as the Sixth Circuit noted in rejecting the same contention in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, 511 F. 2d at 1358 n. 9: "It is not unusual for a provision authorizing the federal government to enforce constitutional rights to have no statute of limitations attached." Neither the public accommodations nor the public facilities titles of the Civil Rights Act of 1964, 78 Stat. 243 *et seq.* and 246 *et seq.*, 42 U.S.C. 2000a *et seq.* and 2000b *et seq.*, contain any limitation on the filing of suits alleging their violation. Moreover, where Congress has imposed a statute of limitations in other public policy statutes, the period of time allowed has been sufficient to prevent frustration of the remedial purposes of the Act. See, *e.g.*, Section 4B of the Clayton Antitrust Act, as added, 69 Stat. 283, 15 U.S.C. 15b (4-year period).

Petitioner's fear that stale litigation will cause prejudice appears exaggerated. It cannot be "state[d], in the abstract, that prejudice by reason of stale claims will be visited upon employers." *Equal*

Employment Opportunity Commission v. *E. I. du-Pont de Nemours and Co.*, *supra*, 516 F. 2d at 1302. As the Sixth Circuit stated in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, 511 F. 2d at 1358 n. 9:

> Use of a truly "stale" charge will mean that injunctive relief is probably unwarranted under traditional equitable principles. Furthermore, Congress has expressly limited employers' liability for back pay to two years of a charge's filing.

Moreover, any prejudice from delays is likely to be felt more strongly by the Commission, which is the party bearing the burden of proving that discrimination occurred.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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